IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1637

EXECUTIVE AERO, INC., a Minnesota corporation,
Petitioner,

vs.

BAACT CORPORATION, a Pennsylvania corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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May 18, 1977.

1977—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

The petitioner, Executive Aero, Inc., a Minnesota corporation, prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of Minnesota rendered in these proceedings on February 17, and March 17, 1977, respectively, affirming the opinion and judgment of the Minnesota District Court rendered in these proceedings on October 29, and November 4, 1975, respectively.

OPINIONS BELOW

The opinion of the Supreme Court of Minnesota is reported: *BAACT Corp. v. Executive Aero, Inc.*, 251 N.W. 2d 107 (Minn. 1977), and is reprinted herein in Appendix A. The determination of the Minnesota District Court is not reported and is reprinted herein in Appendix B.

JURISDICTION

The Minnesota Courts have decided a federal question of substance not heretofore determined by this Court. The Minnesota Courts, in effect, held that a receiver in a bankruptcy proceeding has the power to convey, at a private sale, an "asset" of the bankrupt (i.e., a chose in action allegedly worth $72,000) which was neither scheduled by the bankrupt nor appraised by the U.S. District Court. Additionally, it held such sale is proper without notice to the bankrupt's creditors and without express approval by the bankruptcy Court. These determinations are contrary to section 70 (f) of the Bankruptcy Act, 11 U.S.C. §110(f), and General Order in Bankruptcy 18.

Date of Minnesota District Court judgment: November 4, 1975.

Date of Minnesota Supreme Court opinion: February 17, 1977.

Date of Minnesota Supreme Court order denying rehearing: March 17, 1977.

Date of Minnesota Supreme Court judgment: March 17, 1977.

It is believed that jurisdiction of this Court to review the above judgments by certiorari is conferred by 28 U.S.C. §1257.

QUESTIONS PRESENTED

The question presented is whether or not a receiver in bankruptcy may, in a private sale of the debtor's non-

perishable assets, convey title of an asset to the purchaser when that asset is not scheduled and appraised in the bankruptcy proceedings as required by 11 U.S.C. §110(f) and General Order in Bankruptcy 18 and where the existence of the asset was unknown to the court and creditors.

A subsidiary question is whether a purchaser of an asset of a bankrupt's estate pays under legal compulsion or as a volunteer when the purchaser discharges a lien against such asset.

STATUTORY AND RULE PROVISIONS INVOLVED

Bankruptcy Act, §70(f); 11 U.S.C. §110(f):

> "The court shall appoint a competent and disinterested appraiser and upon cause shown may appoint additional appraisers, who shall appraise all the items of real and personal property belonging to the bankrupt estate and who shall prepare and file with the court their report thereof. Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. Whenever a sale of real or personal property of a bankrupt is made by or through an auctioneer employed by the court, receiver, or trustee, the auctioneer must be a duly licensed or authorized auctioneer in the place where the sale is to be conducted."

General Order in Bankruptcy 18:

> "(1) All sales shall be by public auction unless otherwise ordered by the Court. Where the property is sold by an auctioneer he shall, upon completion of the sale, file with the Court and also furnish the receiver or

trustee an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot, or for the property as a whole if it is sold in bulk.

"(2) Upon application to the Court, and for good cause shown, the receiver or trustee may be authorized to sell the property of the estate or any specified portion thereof at private sale; in which case he shall keep an accurate and itemized account of all property sold, of the price received therefor, and to whom sold, which account he shall forthwith file with the Court."

STATEMENT OF THE CASE

In bankruptcy proceedings, when one bids for and buys real estate of the debtor against which there is a valid lien, the bidder subtracts the amount of the lien from the price he is willing to pay for the realty and enters a bid for the balance. Thus, if he is the successful bidder and thereafter discharges the lien, he ultimately pays his estimation of the value of the realty.

By a series of events in the instant case, such a bidder was permitted to acquire realty of the debtor and an interest arising out of the lien against that realty with the result that the bidder acquired the realty and a $72,000 windfall arising out of his discharge of that lien. Here is how the foregoing was accomplished—

Prior state court proceedings: Various plaintiffs commenced an action in the District Court of the State of Minnesota against Executive Aero, Inc. (the petitioner herein), and against Mooney Aircraft, Inc., to recover damages for personal injuries, property damage, and death arising out of an airplane crash in Wisconsin. The matter was tried in

1967 and resulted in judgments against Mooney and Executive Aero in the total amount of $160,345. Under Minnesota law, Mooney and Executive Aero were jointly and severally liable to the plaintiffs in that amount. Mooney owned real estate in Texas. By appropriate proceedings in 1968, the Minnesota judgments were entered in Texas and, by Texas law, the judgments became a lien on Mooney's Texas realty.

Bankruptcy proceedings: In 1969, Mooney commenced voluntary bankruptcy proceedings in the U.S. District Court, Western District of Texas. On March 13, 1969, American Electronics Laboratories, Inc. (AEL) made a Purchase Offer to the receiver in the Mooney bankruptcy proceeding to buy all of Mooney's assets for an ultimately agreed price of $850,000. The offer did not describe any specific asset. The offer specified that AEL would not be liable for any of Mooney's debts and that AEL would receive clear title to all of Mooney's assets subject only to valid liens which might exist against any of Mooney's assets. At the first creditors' meeting (March 13 and 14, 1969), the receiver reported AEL's Purchase Offer to the Referee and the Referee ordered that the offer be accepted. Pursuant to this order, the receiver executed a bill of sale conveying to AEL all of Mooney's personal property described in the bankruptcy schedules and all Mooney's personal property *not described in the bankruptcy schedules*. The bankruptcy schedules did not describe any claim which Mooney may have had for contribution against Executive Aero in respect to the Texas judgments described above.

Current state court proceedings: After "acquiring" Mooney's assets in the bankruptcy proceedings pursuant

to the Purchase Offer, AEL discharged the above-described judgment liens by paying the judgment creditors (i.e., the original plaintiffs) the sum of $144,310.[1] By mesne transactions, BAACT (respondent herein) became the owner of all of AEL's interest in Mooney's assets. BAACT then claimed that by reason of the Bankruptcy Bill of Sale, it had become the owner of any chose in action which Mooney may have possessed to recover contribution from Executive Aero. Specifically, BAACT claimed that AEL paid more than Mooney's proper share of the above described judgments; that, by operation of Minnesota law, Mooney acquired a right to obtain contribution from Executive Aero; that that right was acquired by AEL by reason of the Bankruptcy Bill of Sale; and that BAACT, as AEL's successor, was entitled to enforce that right in Minnesota State Court. The Minnesota District Court agreed, holding (1) that Mooney had possessed an inchoate claim for contribution from Executive Aero when it went into bankruptcy; (2) that AEL's partial payment of the Mooney judgments had the effect of "ripening" Mooney's claim for contribution; and (3) that BAACT was the owner of Mooney's contribution claim against Executive Aero by virtue of the Bankruptcy proceedings. The Minnesota Supreme Court affirmed without directly considering the issue in its opinion.

Petitioner raised the effect of the federal statutes and bankruptcy rules upon respondent's right to bring this action in its initial pleadings in the Minnesota District Court and at every stage of the proceedings thereafter in the Minnesota District and Supreme Courts. See District Court decision in Appendix B herein.

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[1]Executive Aero paid the balance due on the judgments.

REASONS FOR GRANTING THE WRIT

It is petitioner's understanding that, prior to the decision in the instant case, it was clearly understood by bankruptcy referees, trustees, receivers, and counsel throughout the United States that 11 U.S.C. §70(f) meant exactly what it says and that, therefore, a receiver in bankruptcy does not have the power to convey, at a private sale, an "asset" of the bankrupt which was neither scheduled by the bankrupt nor appraised by the bankruptcy court. Furthermore, it was understood that an "asset" may not be so sold without notice to the creditors and express approval by the bankruptcy court.

Specifically, §70(f) of the Bankruptcy Act, 11 U.S.C. §110(f), mandates that all items of personal property owned by the debtor be appraised and, in order to protect creditors, the courts have consistently refused to permit the sale of assets which have not been subjected to the appraisal process. For example, as stated *In re Insulation and Accoustical Specialties*, 311 F. Supp. 1209, 1215 (1969):

> "Section 70, Sub. F of the Act mandatorily requires that 'all the items of * * * personal property', not just some of those items, shall be appraised. In re Leighton (D. Ariz. 1963), 211 F. Supp. 667, establishes that Section 70 F means exactly what it says. In re Prather Elec. Co. (S.D. Ill. 1956), 138 F. 2d 433, holds that a failure of compliance with that duty which results in a loss to a creditor renders the trustee of the bankruptcy estate personally liable."

Thus, in *In re Layton*, 221 F. Supp. 667 (D. Ariz. 1963), the Court vacated an order approving a private sale of a debtor's chose in action because the asset had not been

appraised. The Court stressed that the Congressional requirement of appraisal was designed to insure that both the Court and the creditors be fully informed of the true value of the debtor's estate.

General Order in Bankruptcy 18 (now embodied in Bankruptcy Rule 606) dovetails with 11 U.S.C. §110(f) and requires that if the debtor's property is sold at a private sale, the receiver shall keep an itemized account of the property sold and the price received therefor. In the instant case, the account of the Mooney property sold to AEL contains no mention of a chose in action much less the price paid therefor. Moreover, it cannot be reasonably argued that the Court, in approving a sale of all of the debtor's unscheduled personal property, impliedly approved the sale of a $72,000 chose in action which was unknown to the Court or to the receiver. Neither the Court nor the creditors had any idea that property of this potential value was being conveyed and thus did not have any intent so to convey.

To avoid this type of thing happening, it is settled bankruptcy practice throughout the country—until the instant case—that a receiver may not sell an asset which is neither scheduled by the debtor nor known to the Court or receiver at the time of the sale. Instead, an asset of this kind remains the property of the referee and if, as here, it is discovered after closing the estate, it can be sold or transferred in accordance with the provisions of 11 U.S.C. §11(a)(8), Bankruptcy Act §2(a)(8), and General Order 15 (now Bankruptcy Rule 515).

The universal rule (until the instant case) is succinctly stated in 1 Collier, *Bankruptcy*, ¶2.28, p. 233:

> "Under General Order 18 where choses in action belong to the bankrupt's estate are sold at a private sale, it is necessary that an accurate account of the sale, including the price and to whom sold, should be filed with the Court. *A general statement that it was intended to convey all of the assets of the estate is not sufficient to convey title to a purchaser.*" (Emphasis supplied).

Accord: *In re Butler Candy Co., Icn.*, 8 F. 2d 311 (3rd Cir. 1925); *Appling v. Minarets & Western Ry. Co.*, 100 Cal. App. 800, 280 Pac. 1029 (1929); 8A C.J.S. *Bankruptcy*, §323.

In *Butler Candy*, it was contended that a sale of "all assets" had the effect of transferring title of valuable insurance policies which were unknown to the referee at the time of the sale. It was held that the insurance policies remained part of the bankrupt's estate for the benefit of its creditors—

> "The insurance policies in question are not scheduled in the bankrupt schedules filed by the bankrupt in this case. They were not inventoried or appraised by the appraisers appointed to appraise the assets of the estate. The policies in question being in the bank in a safety deposit vault. Their existence was not disclosed to creditors at the time of sale of the bankrupt assets * * *. The Referee finds that it was intended at this [private] sale to convey all the assets of the bankrupt except the real estate. Therefore, he concludes that the insurance policies must go with this sale and reforms the sale order, so as to direct the assignment of the insurance policies to the purchaser at the receiver's sale. We can not agree with the finding of the referee. At the time the creditors met to discuss this proposition, it was not disclosed to them, and they did not know that there were any insurance policies; and, even if the existence of the insurance

policies had been disclosed, there would have been no reason whatever for their sale as a part of the assets for these policies have a well-understood cash value, equivalent to so much money in the bankrupt's estate.

"We believe that, if the policies had been disclosed to the referee at the time, he would not have been justified in directing a sale of them as a part of the bankrupt estate. He must rather have directed that the trustee collect the cash surrender value thereof. We do not find anything in the evidence of what transpired before the referee at the time of the sale which would justify the amendment of the order of sale, so as to include these policies. The parties attending the sale were not bidding on these insurance policies as a part of the assets. The petition asking for the sale did not ask leave to sell them. The order of the referee directing the sale did not order the trustee to make any conveyance of insurance policies. Under these facts, we think the referee erred in his order of November 12, 1924, directing the assignment of these insurance policies to L. J. Nadler."

Appling is virtually identical to the instant case. There, the claimant alleged that he was the owner of a chose in action which had been acquired from a debtor in a private bankruptcy sale of all of the debtor's scheduled and unscheduled assets. The chose in action was not scheduled. It was held that, under such circumstances, the claimant did not acquire title to the chose in action—

> "The Bankruptcy Act provides that the Supreme Court of the United States shall prescribe all necessary rules, forms, and orders as to procedure and for carrying said act into effect. [citations omitted] In conformity with this statute said court has prescribed

> the general orders in bankruptcy. Rule 18 of said orders [see 11 USCA 53] provides that sales shall be made by public auction unless otherwise ordered by the court and, further, that upon application to the court and for good cause shown, the trustee may be authorized to sell any specified portion of the bankrupt's estate at private sale; in which case he shall keep an accurate account of each article sold and the price received therefor and to whom sold, which account he shall file at once with the referee."
>
> * * * * *
>
> "We are of the opinion that, the sale having been made at private sale, it was necessary under rule 18, that an accurate account of the sale of the chose in action, here sued upon, together with the price and to whom it was sold, be filed with the referee in bankruptcy. Under the record here made, the claim sued upon is nowhere mentioned in the bankruptcy proceeding. A general statement to the effect that it was intended to convey all of the assets of the estate as heretofore set forth, is relied upon by appellant to establish a sale of this aellged cause of action. We believe the record is not sufficient to show a conveyance of title to this plaintiff."

The reason behind 11 U.S.C. §110(f) and General Order 18, as exemplified by *Butler Candy* and *Appling*, is cogently illustrated by the instant case. Neither the receiver nor the Referee nor the creditors had any idea that Mooney's unscheduled assets included an asset possibly worth $72,000. Probably AEL did not know it either. If it did, it was certainly guilty of fraudulent conduct. Cf. *Phelps v. McDonald*, 99 U.S. 298 (1878); *Clark v. Clark*, 17 How, 315 (1854). AEL got exactly what it paid for. It knew it was buying realty subject to a lien and undoubtedly

calculated its bid so as to subtract the amount of the lien from the price it was willing to pay to the receiver for the realty. The result is that when it discharged the lien, it acquired realty for the price it wanted to pay, and now its successor claims that it is not only entitled to the realty but also to a $72,000 windfall arising out of the discharge of the lien. If a valid claim for contribution in the amount of $72,000 exists, it remains part of the debtor's estate and pursuant to 11 U.S.C. §18(a)(8), the estate may be reopened and the claim may be prosecuted for the benefit of Mooney's unsecured creditors. Since the Referee and receiver are not parties to the current litigation, the judgment in the instant case is not binding on them. The result could well be that Executive Aero may be called upon to pay the $72,000 twice—once to BAACT upon the theory adopted by the Minnesota court (i.e., that BAACT is the owner of the chose in action) and once more to Mooney's creditors if the bankruptcy court, pursuant to 11 U.S.C. §110(f) and General Order 18, determines that AEL (and thus BAACT) did not acquire the chose in action.

The Congress has mandated that the bankruptcy laws shall be administered uniformly throughout the United States and this Court, pursuant to Congressional authority, has adopted carefully drawn orders and rules to supplement the bankruptcy statutes. If the result in the instant case is allowed to stand, it will mean that State courts are free to ignore those statutes, rules and orders. Furthermore, it will mean that, in state court proceedings, a purchaser of unscheduled assets may be permitted to assert rights against third persons to the detriment of the creditors thus subverting the basic philosophy of the bankruptcy act: The

protection of the creditors' interests. Finally, as the result in the instant case reveals, the theory adopted by the Minnesota courts relative to title to an unscheduled chose in action may well lead to a debtor of the bankrupt's estate being called upon to pay his debt twice—once to the alleged purchaser pursuant to a state court judgment and again to the bankrupt's trustee pursuant to a 11 U.S.C. §18(a)(8) proceeding. AEL (and thus BAACT) neither legally nor morally acquired a right to pursue a stranger to the bankruptcy proceedings so that it might acquire a $72,000 windfall at the expense of the creditors or of petitioner Executive Aero or both.

While the basis of the Minnesota District Court's decision is clear (as set forth above), the Minnesota Supreme Court declined to rule upon the issue presented to it on the ground that petitioner Executive Aero was attempting a collateral attack upon the bankruptcy proceedings. Of course it was doing no such thing. In order for BAACT to assert its claim, it must prove that it is the legal owner of the chose in action. That title is dependent upon the legal effect of the bankruptcy order approving a sale of unscheduled assets: Did or did not that sale pass title from the Referee or Trustee to AEL-BAACT? The answer to that question is a matter of federal law and does not constitute a collateral attack. See *Appling v. Minarets & Western Ry. Co., supra*.

The decision of the Minnesota Courts in the instant case will inevitably create confusion and difficulties in an important and—until the instant case—well-settled area of bankruptcy law which will—sooner or later—require intervention by the federal courts to re-establish the pre-existing law. There is no reason why such intervention should be delayed until the matter gets entirely out of hand.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Minnesota Supreme Court affirming the judgment and opinion of the Minnesota District Court.

Respectfully submitted,

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APPENDIX A

Minnesota Supreme Court
Filed February 10, 1977
John McCarthy, Clerk

BAACT CORPORATION,

Respondent,

vs.

EXECUTIVE AERO, INC.,

Appellant.

SYLLABUS

1. One joint tortfeasor is entitled to contribution from the other where the issues of liability were tried under Wisconsin law and each was found negligent, and where the negligence of defendant, against whom contribution is sought, was independent of the negligence of plaintiff.

2. A judicial sale in bankruptcy vesting a chose in action is not subject to collateral attack.

Affirmed.

Considered and decided by the court en banc.

OPINION

YETKA, Justice.

BAACT CORP. commenced this action against Executive Aero, Inc., seeking indemnity or contribution. The trial court ordered judgment for BAACT in the sum of $72,-155.25. Executive Aero appeals from the judgment and the denial of its post-trial motion. We affirm.

The following issues are presented by this appeal:

(1) Does Wisconsin or Minnesota law govern the issue of contribution?

(2) Does a purchaser of assets in bankruptcy succeed to a bankrupt's right of contribution?

On March 21, 1965, an aircraft owned by Tayam, a partnership, crashed in Wisconsin. Seven passengers were killed and five were injured. Tayam sued the manufacturer of the plane, Mooney Aircraft, Inc. (Mooney), and the retailer, Executive Aero, Inc. A second suit on behalf of the passengers was brought against the same defendants.

Both cases were venued in Hennepin County and consolidated for trial. The issue of negligence was submitted to the jury under the Wisconsin comparative negligence statute. The jury found Executive Aero 55 percent and Mooney 45 percent causally negligent. Damages totaled $160,345—$131,845 for various personal injuries and $28,500 for damage to Tayam's aircraft. Judgment was entered against both defendants with each being jointly and severally liable.[1] To secure the collection of their judgment against Mooney the successful plaintiffs brought an action on the judgment in Texas, where Mooney owned real estate. They secured a Texas judgment in the sum of $160,345 on May 10, 1968.

On February 17, 1969, Mooney filed a petition for voluntary bankruptcy and the bankruptcy court authorized the receiver to sell Mooney's assets to American Electronic Laboratories, Inc. (AEL). AEL formed a new corporation, BAACT CORP.,[2] to receive the assets of the bankrupt and to continue its business operations. A bill of sale was issued to BAACT on March 25, 1969.

[1]Executive Aero, Inc., appealed to this court in Tayam v. Executive Aero, Inc., 283 Minn. 48, 166 N.W.2d 584 (1969). The judgment against it was affirmed. Mooney did not appeal the judgment against it.

On May 10, 1969, BAACT paid $144,310.50 toward the Texas judgment entered against Mooney with checks drawn on AEL. Executive Aero's insurer, Ohio Casualty Insurance Company, satisfied the balance of the judgment.

In 1970, BAACT and AEL brought this action in Hennepin County District Court to compel contribution or indemnity from Executive Aero. The court required BAACT and AEL to decide which of them, if either, owned Mooney's alleged cause of action for contribution. The parties chose BAACT. The court ordered a bifurcated trial of the case to sever the issues as to the plaintiff's claim for contribution from the issues as to the plaintiff's claim for indemnity and so as to provide for a hearing to take up the legal questions as to contribution. The other issues were to be decided in separate trial by jury at a later date. In addition, the court ordered the parties to prepare a stipulated set of facts and to brief three issues:

(1) Has plaintiff acquired, by assignment or otherwise, a viable cause of action for contribution against defendant?

(2) Are the contribution rights governed by the law of Wisconsin or the law of Minnesota?

(3) Are the determinations made in the jury's verdict in the original actions res judicata,

The court held that BAACT was entitled to contribution as a matter of law and made the following conclusions of law:

[2]This new corporation twice changed its name. Initially it was called Mooney Aircraft Corporation. Its name was subsequently changed to Aerostar Aircraft Corporation of Texas and finally to BAACT CORP.

"CONCLUSIONS OF LAW

"1. Plaintiff BAACT CORP. has a valid cause of action for contribution.

"2. Wisconsin Law governs the issue of contribution between the parties.

"3. The following facts found by the jury in [the original actions filed by the injured passengers and the aircraft owner against Mooney and Executive Aero] are res judicata:

a. Mooney Aircraft, Inc. and Executive Aero, Inc. were joint tort-feasors.

b. Mooney Aircraft, Inc. was negligent, its negligence was a direct cause of plaintiffs' injuries and damages, and the percentage of negligence attributable to Mooney Aircraft, Inc. arising out of the accident of March 25, 1965, was 45 per cent.

c. Executive Aero, Inc. was negligent, its negligence was a direct cause of plaintiffs' injuries and damages, and the percentage of negligence attributable to Executive Aero, Inc. arising out of the accident of March 25, 1965, was 55 per cent.

"4. Plaintiff BAACT CORP. has succeeded to the rights of contribution of Mooney Aircraft, Inc.

"5. Plaintiff BAACT CORP. is entitled to contribution from Executive Aero, Inc. pursuant to the laws of the State of Wisconsin.

"6. Under the laws of the state of Wisconsin, plaintiff's payment rendered complete its causes of

action for contribution against the defendant above-named in the amount of $72,155.25."

The trial court applied Wisconsin law to the issue of contribution. Appellant contends it committed error in so doing. However, since in the original Tayam case Wisconsin law was applied on the issue of liability, that determination became the law of the case. The first trial determined that Executive Aero was negligent. In affirming that determination on appeal, this court held there was adequate independent evidence of negligence on the part of Executive Aero. Thus, the issue of passive versus active negligence and the filing of cross claims need not be discussed. The jury in the original action was given sufficient evidence regarding the issues of negligence and apportionment of that negligence between the defendants which, when properly determined by the jury, foreclosed the necessity for a redetermination of these issues. Thus, if it was the proper party to bring this action, the plaintiff is entitled to contribution from Executive Aero.

We hold that BAACT established it holds a chose in action which is prima facie valid; that the chose in action was duly assigned to it; and that the chain of title dates back to the judicial sale of the bankruptcy court. Executive Aero is estopped from collaterally attacking the integrity of that judicial order and decree. A decree of a bankruptcy court which confirms a sale by the trustee is not subject to collateral attack. See, 9 Am. Jur. 2d Bankruptcy, §1217; 8A C.J.S. Bankruptcy, §325. A confirmed sale in bankruptcy confers full legal and equitable title upon the purchaser. 4A Collier, Bankruptcy §70.98[18].

The trial court is affirmed in all respects.

APPENDIX B

STATE OF MINNESOTA — DISTRICT COURT
County of Hennepin — Fourth Judicial District

BAACT CORPORATION, a Pennsylvania corporation,
Plaintiff,

vs.

EXECUTIVE AERO, INC., a corporation,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

File No. 707384

The above entitled action came on before the Court for pretrial conference on May 23, 1975. The Court ordered a bifurcated trial of this case so as to sever the issues as to the plaintiff's claim for contribution from the issues as to the plaintiff's claim for indemnity and so as to provide for a hearing to take up the legal questions as to contribution and with the other issues for a separate trial by jury at a later date.

At said pretrial conference the Court ordered that the parties prepare an agreed statement of the facts and furnish the Court with briefs upon the following subjects, with hearing to be held on July 23, 1975, as follows:

1. Has plaintiff acquired, by assignment or otherwise, a viable cause of action for contribution against defendant?

2. Are the contribution rights governed by the law of Wisconsin or the law of Minnesota?
3. Are the determinations made in the jury's verdict in the original actions res judicata?

In accordance with said order plaintiff submitted a Statement of Facts Proved supported by documents marked as exhibits, the genuineness of which documents was not contested. Both parties submitted briefs and the Court received further briefs and legal citations from respective counsel.

The above entitled action severed in accordance with said pretrial order, duly came on for hearing before the undersigned, one of the Judges of the above named Court on July 23, 1975. Messrs. Nathan A. Cobb and Jerome C. Briggs appeared for plaintiff. Messrs. Roderick D. Blanchard and Thomas G. Lovett appeared for defendant.

After thorough consideration of all of the agreed facts and the exhibits, and upon the arguments and briefs of counsel, and upon all the files, records and proceedings herein and Wisconsin law having been applied by the Court in the original action and said law governing the contribution rights between the parties to this action, there being no issues that remain for a trial, the Court makes the following:

FINDINGS OF FACTS

1. On February 18, 1969 American Electronic Laboratories, Inc. made a Purchase Offer (later amended as of March 13, 1969) to purchase all of the assets of Mooney

Aircraft, Inc., which had been declared a bankrupt in the United States District Court for the Western District of Texas, San Antonio Division. Said Purchase Offer provided:

> "Business and Assets": — Business, cash, bank accounts, accounts receivable, notes receivable, raw materials, work in process, inventories, products, choses in action and claims (whether or not contingent, liquidated or unliquidated, and including but not limited to, tax refunds and claims, other refunds, deposits and causes of action of every nature), * * *

The Purchase Offer agreed to purchase:

> "(1) Each and every asset (real, personal, mixed, tangible and intangible) of the companies and of the Receiver and Trustee, is included in the sale and shall be delivered to the Buyer at Closing, whether or not specifically described in any provision of this Purchase Offer, whether or not included in the bankruptcy schedules of the Companies, and whether existing on the date of this Purchase Offer or created hereafter. Businesses and Assets unknown to the Companies the Receiver, the Trustee and/or the Buyer at the time of Closing, or undelivered or unassigned to Buyer at the Closing, or omitted from any deed, bill of sale or other transfer document at the time of Closing, shall nevertheless be deemed to be effectively delivered, assigned, transferred and conveyed to Buyer at the Closing."

2. The Purchase Offer among other things provided:

> "11. *Assignment.* The Buyer may assign the Buyer's rights or obligations under this Purchase Offer to any person, firm or corporation organized by the Buyer for such purpose . . ."

American Electronic Laboratories, Inc. organized for such purpose a Pennsylvania corporation named Mooney Aircraft Corporation. At the first meeting of creditors on March 13, 1969, the Receiver in Bankruptcy recommended the acceptance of the Purchase Offer from American Electronic Laboratories, Inc. and at a reconvened first meeting on March 14, 1969, the Referee in Bankruptcy, after having considered all of the evidence, ordered that the Purchase Offer be accepted by the Receiver and upon acceptance ordered further that such sale of the assets be confirmed and the Receiver instructed to execute all documents and to do all things necessary to convey legal title and to deliver all of the assets in accordance with the terms of the Purchase Offer. Pursuant thereto and upon payment to him of the cash purchase price, the Receiver executed and delivered to Mooney Aircraft Corporation a Bill of Sale dated March 25, 1969. The corporate name was changed to "Aerostar Aircraft Corporation of Texas" and later to the present name "BAACT CORP."

3. There existed Valid Liens against the bankrupt Mooney Aircraft, Inc. including the judgment entered on May 10, 1968 in Civil Action 68-98-SA in the United States District Court for the Western District of Texas, San Antonio Division in an action entitled:

ROBERT M. LENIHAN, ET AL.

vs.

MOONEY AIRCRAFT, INC.

Said judgment was in the following amounts in favor of the several judgment creditors therein:

Robert M. Lenihan, Sr.	$60,000.00
Robert M. Lenihan, Jr.	1,500.00
Susan M. Lenihan	1,500.00
Cheryl Burgess	14,150.00
Jan Olson, Administratrix of the Estate of Elsie E. Lenihan, Deceased	31,500.00
Jan Olson, Administratrix of the Estate of Charlene Burgess, Deceased	15,000.00
Tayam	28,500.00

Said judgment had been filed and entered of record in the Judgment Records of Tom Green County, Midland County and Kerr County in the State of Texas.

The said Texas action was brought to recover on the judgments of this Court in Cases No. 615436 and 616259 entered in favor of the same plaintiffs and in the same amounts against Executive Aero, Inc., a Minnesota corporation, and Mooney Aircraft, Inc., a foreign corporation, defendants, and the Texas judgment described above is based solely and exclusively upon the judgment of this Court in said Cases No. 615436 and 616259. Executive

Aero, Inc., the defendant here, was not named as a defendant in said Texas action.

4. Plaintiff paid to the judgment creditors listed above, in the form of certified checks dated March 21, 1969, the following amounts:

To Robert M. Lenihan, Sr. and his attorney Charles T. Hvass $54,000.00.

To Robert M. Lenihan, Sr. as father and Natural Guardian of Robert M. Lenihan, Jr. and his attorney, Charles T. Hvass $1,350.00.

To Robert M. Lenihan, Sr., as father and Natural Guardian of Susan M. Lenihan and his attorney, Charles T. Hvass $1,350.00.

To Charles J. Burgess as father and Natural Guardian of Cheryl Burgess and his attorney, Charles T. Hvass $12,735.00.

To Charles J. Burgess and his attorney Charles T. Hvass $7,375.00.

To Jan Olson, Administratrix of the Estate of Elsie E. Lenihan, Deceased, and her attorney, Charles T. Hvass $28,350.00.

To Jan Olson, Administratrix of the Estate of Charlene Burgess, Deceased, and her attorney, Charles T. Hvass $13,500.00.

To TAYAM, a Partnership, and its attorney, Charles T. Hvass $25,650.00.

After March 29, 1969 the said certified checks were properly endorsed by the respective payees, said checks were paid and the defendant in this action took credit for the amounts thereof as applied to the judgments against said defendant Executive Aero, Inc.

5. Plaintiff paid the foregoing amounts, not as a volunteer, but in order to protect its own interest in the property so acquired from the bankrupt estate.

6. The Bill of Sale dated March 25, 1969 delivered by the Receiver conveyed the following described property:

> "1. All personal property (whether tangible or intangible) referred to or described in the bankruptcy schedules of Mooney Aircraft, Inc. . . .
>
> "2. All personal property (whether tangible or intangible owned by or due to Mooney Aircraft, Inc. . . whether or not such personal property is referred to or described in the bankruptcy schedules filed by Mooney Aircraft, Inc. . . .
>
> "3. Without limitation to the foregoing, all other personal property (tangible or intangible) within the description of the "Businesses and Assets" sold to American Electronic Laboratories, Inc. or its assignee in accordance with a Purchase Offer dated as of March 13, 1969 directed to Lukin Gilliland, Esq., Receiver in Bankruptcy of Mooney Aircraft, Inc., Bankrupt, and Mooney Corporation, Bankrupt, and accepted by the Receiver on March 14, 1969 pursuant to an Order of the Honorable Henry Hirshberg, Referee in Bankruptcy. The aforesaid Purchase Offer is hereby incorporated herein by reference and made a part hereof as if set forth herein at length."

7. The right to contribution which arose out of the aircraft accident of March 25, 1965 was a chose in action and all right, title and interest in said right of contribution passed to plaintiff within the description of "Business and Assets" in said Bill of Sale.

8. On March 21, 1965, an aircraft crashed in the State of Wisconsin. The abovementioned two actions in this Court arose out of said crash, being said Cases Nos. 615436 and 616259.

9. Said two actions came on for trial in this court before Judge Eugene Minenko and a jury on January 30, 1967. At said trial Wisconsin law was applied to the issue of liability.

10. In accordance with Wisconsin law Judge Minenko submitted Special Interrogatories to the jury. The jury by its answers attributed 45% of the negligence to Mooney Aircraft, Inc. and 55% of the negligence to Executive Aero, Inc. and further found that the negligence of both said parties was a direct cause of the plaintiffs' injuries and damages; the jury awarded damages to the several plaintiffs in the respective amounts set forth above.

11. Neither Mooney Aircraft, Inc. nor Executive Aero, Inc. committed any intentional wrong or any unlawful act which in any way caused the injuries and damages to the plaintiffs in Cases Nos. 615436 and 616259.

12. In Cases Nos. 615436 and 616259 judgments against Executive Aero, Inc. and Mooney Aircraft, Inc. for said respective amounts was entered on July 17, 1967 and thereafter were of record in this Court. Executive Aero Inc. appealed from said judgments to the Supreme Court of Minnesota, Mooney Aircraft, Inc. did not appeal. The said judgments remained totally unsatisfied until the, payment of the $144,310 by plaintiff under the circumstances above stated.

13. On March 14, 1969, the judgments of this court in Cases Nos. 615436 and 616259 were affirmed upon Executive Aero, Inc.'s appeal. Tayam v. Executive Aero, Inc., 283 Minn. 48, 166 N.W.2d 584. The Supreme Court, stated: "The issue of liability in the trial of the action was governed by the law of Wisconsin. . . ." (283 Minn. 50, 166 N.W.2d 585)

14. Thereafter Executive Aero, Inc., through its insurer Ohio Casualty Insurance Company, after taking credit for the $144,310.50 paid by plaintiff, paid off the balance of the judgments including interest and costs of record against Executive Aero, Inc.

15. Tabulation is as follows:

	Paid by Plaintiff	Amount of Judgment
Robert M. Lenihan, Sr.	$ 54,000.00	$ 60,000.00
Robert M. Lenihan, Jr. by Robert M. Lenihan, Sr., his father and natural guardian	1,350.00	1,500.00
Susan M. Lenihan, by Robert M. Lenihan, Sr., her father and natural guardian	1,350.00	1,500.00
Cheryl Burgess, by Charles J. Burgess, her father and natural guardian	12,735.00	14,150.00
Charles J. Burgess	7,375.50	8,195.00
Jan Olson, Special Administratrix of the Estate of Elsie E. Lenihan	28,350.00	31,500.00
Jan Olson, Special Administratrix of the Estate of Charlene Burgess	13,500.00	15,000.00
Tayam, a Partnership	25,650.00	28,500.00
Total	$144,310.50	$160,345.00
45 per cent of judgments	72,155.25	
More than plaintiff's share	$ 72,155.25	

CONCLUSIONS OF LAW

1. Plaintiff BAACT CORP. has a valid cause of action for contribution.

2. Wisconsin Law governs the issue of contribution between the parties.

3. The following facts, found by the jury in District Court File Nos. 615436 and 616259, are res judicata:

a. Mooney Aircraft, Inc. and Executive Aero, Inc. were joint tort-feasors.

b. Mooney Aircraft, Inc. was negligent, its negligence was a direct cause of plaintiffs' injuries and damages, and the percentage of negligence attributable to Mooney Aircraft, Inc. arising out of the accident of March 25, 1965, was 45 per cent.

c. Executive Aero, Inc. was negligent, its negligence was a direct cause of plaintiffs' injuries and damages, and the percentage of negligence attributable to Executive Aero, Inc. arising out of the accident of March 25, 1965, was 55 per cent.

4. Plaintiff BAACT CORP. has succeeded to the rights of contribution of Mooney Aircraft, Inc.

5. Plaintiff BAACT CORP. is entitled to contribution from Executive Aero, Inc. pursuant to the laws of the State of Wisconsin.

6. Under the laws of the State of Wisconsin, plaintiff's payment rendered complete its cause of action for contribution against the defendant abovenamed in the amount of $72,155.25.

ORDER FOR JUDGMENT

Let judgment be entered that plaintiff have and recover against defendant the amount of Seventy Two Thousand One Hundred Fifty Five Dollars and 25/100ths ($72,-155.25).

Dated: Oct. 29, 1975.

BY THE COURT

/s/ HAROLD KALINA
Judge

MEMORANDUM

Plaintiff stands in the shoes of Mooney Aircraft, Inc. with respect to the contribution rights arising out of its payment under the laws of the State of Wisconsin. At the same time plaintiff has no greater rights than Mooney Aircraft, Inc. would have had and it is bound by res judicata by the finding that the percentage of negligence attributable to Mooney Aircraft, Inc. arising out of the accident of March 21, 1965 was 45 per cent. This precludes any recovery of indemnity in favor of plaintiff, leaving no issues for a trial and accordingly final judgment is ordered.

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1637

EXECUTIVE AERO, INC., a Minnesota corporation,
Petitioner,

vs.

BAACT CORPORATION, a Pennsylvania corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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1977—Northwest Brief Printing Co., 316 Chicago Avenue, Minneapolis 55415—338-5078

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BAACT CORPORATION, a Pennsylvania corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent BAACT Corporation respectfully presents this brief in opposition to the petition of Executive Aero, Inc. for a writ of certiorari to review the opinion and judgment of the Minnesota Supreme Court affirming the opinion and judgment of the Minnesota District Court.

INTRODUCTION

In accordance with Rules 24 and 40 of the Rules of this Court, BAACT accepts the petitioner's recital of the opinions delivered by the courts of Minnesota. However, BAACT is dissatisfied with petitioner's formulation of the questions presented, and with petitioner's incomplete statement of the case. Therefore BAACT submits its revisions and supplements to the Court.

ISSUE PRESENTED

Can a stranger to a bankruptcy proceeding collaterally attack a judicial sale of all the bankrupt's assets when such sale was confirmed by the bankruptcy referee and consummated by a Court ordered receiver's bili of sale?

STATEMENT OF THE CASE

Prior state court proceedings: Various plaintiffs commenced an action in the District Court of the State of Minnesota against Executive Aero, Inc. (the petitioner herein), and against Mooney Aircraft, Inc. (Mooney) to recover damages for personal injuries, property damage and death, arising out of a 1965 airplane crash in the State of Wisconsin. The matter was tried to a jury in the State of Minnesota in 1967, and resulted in judgments against Executive Aero and Mooney in the total amount of $160,345.00. The case was submitted under the theory of comparative negligence, and the jury found Executive Aero 55% causally negligent, and Mooney 45% causally negligent. On appeal taken to the Minnesota State Supreme Court by Executive Aero[1] the Court concluded[2] that "there was ample evidence" to support the jury's finding of negligence against both defendants.[3]

Mooney owned real property in Texas and Executive Aero's insurer, the Ohio Casualty Insurance Company, retained Texas counsel to bring suit upon the Minnesota

[1]Mooney did not join in this earlier appeal.

[2]The Court's opinion is reported in *Tayam v. Executive Aero, Inc.*, 283 Minn. 48, 166 N.W.2d 584 (1969).

[3]It should be noted that in the current Court proceeding, in addition to the issues raised in Executive Aero's petition, the Minnesota State Supreme Court affirmed the trial court's finding that the jury's 1967 allocations of negligence were res judicata as regards the rights of contributions between the parties. (A-5). *BAACT Corp. v. Executive Aero, Inc.*, 251 N.W.2d 107, 109 (Minn. 1977).

aircraft crash judgments. The resulting Texas judgments were entered of record in June of 1968. These Texas judgments established a "valid lien" on Mooney's Texas property.

Bankruptcy proceedings: In 1969 Mooney commenced voluntary bankruptcy proceedings in the United States District Court, Western District of Texas. The judgments which traced back to the aircraft crash action were scheduled, along with nearly $5,000,000.00 of other secured interests on "Schedule A-2, Creditors Holding Securities."

On February 18, 1969, prior to the first meeting of creditors, American Electronic Laboratories, Inc. (AEL), the predecessor in interest of respondent BAACT, extended a purchase offer for all of the Mooney assets to the receiver in bankruptcy. The offer, which included the assumption and payment of nearly $5,000,000.00 worth of valid liens and priority claims, and an additional $650,000.00 in cash, was communicated to some 7,000 creditors, shareholders and other persons holding possible claims against the bankrupt's estate. Under the terms of the purchase offer, AEL was to receive clear title to all of Mooney's assets subject only to "valid liens" against those assets as defined in the purchase offer.

The first meeting of creditors was held on March 13, 1969. At the Court's request, the receiver reported the offer by AEL and a second offer by another corporation. An adversary hearing was held, and after extensive discussion, the AEL offer was amended by increasing the cash component $200,000.00 to a total of $850,000.00 cash. Among other items, the purchase offer was specifically amended to remove a cause of action against the former president of the bankrupt company by stating that the

claim was "not included in the 'business and assets' sold hereunder." The Court received a recommendation from the receiver to accept the AEL offer. The Court then announced that it would recess to the next day, at which time it would hear anyone who could show cause why the offer by AEL should not be accepted.

On March 14, 1969, further adversary hearings were held. After having considered all the evidence, including the receiver's report, and all other information and testimony, the Court found that the assets of the bankrupt had been duly appraised in accordance with competent and available means of appraisal, and that the appraisal showed that the assets were of a value less than the secured debts against the estates if sold at auction and other than as a going business, that the aircraft industry and all persons who would be reasonably expected to be interested in purchasing the bankrupt estates as a going business had had a reasonable opportunity to investigate the value of the bankrupt estates, that AEL could withdraw its offer if not accepted at the time and had indicated that it would consider doing so, that the sale to AEL appeared to make it possible for the bankrupt estates to pay all priority claims and expenses and have some assets available for dividends to unsecured creditors, and further it was the only assurance before the Court that the business which employed some 700 people would continue, and that the offer appeared from all available evidence to be reasonable in amount.

Accordingly the referee ordered that the offer of AEL be accepted and offer of the competing corporation be rejected. The Court's Order specifically required the receiver to execute all documents and to do all things necessary to

convey legal title and to deliver the assets of the bankrupt's estates to AEL "in accordance with the terms of the purchase offer" which was attached to the order and made a part of it "for all purposes."

Pursuant to the Order the receiver executed a bill of sale conveying to AEL all personal property, including all personal property within the description of the "business and assets" in the purchase offer. Business and assets had been defined in the purchase offer to include:

> 1.(b) "Business and Assets": * * * choses in action and claims (whether or not contingent, liquidated or unliquidated, and including, but not limited to, tax refunds and claims, other refunds, deposits and causes of action of every nature), * * * and all other properties and assets (real, personal, mixed, tangible and intangible) owned by, or due to, the Companies or the Receiver or the Trustee, whether or not described in any provision of this Purchase Offer and whether or not included in the bankruptcy schedules filed by the Companies and whether existing on the date of this Purchase Offer or created hereafter.

Current state court proceedings: Because Executive Aero made no payment to the original aircraft crash plaintiffs, the entire judgment lien remained unsatisfied. AEL discharged the lien in question by paying the aircraft crash plaintiffs $144,310.00, an amount $72,155.25 in excess of the liability of Mooney as apportioned by the jury in the State Court trial. Shortly after the payment by AEL, Executive Aero, *taking full credit for the AEL payment,* paid the remaining 10% balance to the judgment creditors.

By assignment BAACT Corporation (respondent herein) became the owner of all of AEL's interests in the Mooney assets. BAACT commenced this action to recover contribution. At trial, the Minnesota District Court found for BAACT, holding that (1) Mooney had possessed an inchoate claim for contribution from Executive Aero when it went into bankruptcy; (2) that AEL's payment of $72,-155.25 in excess of Mooney's fair share of the aircraft crash judgments had the effect of "ripening" Mooney's claim for contribution; and (3) that BAACT was the owner of Mooney's contribution claim against Executive Aero by virtue of the bankruptcy sale. The Minnesota Supreme Court affirmed the trial court's finding that the record, which had included the receiver's bill of sale, bankruptcy schedules, documents transferring assets from AEL to BAACT, and the final Order of the bankruptcy court, showed that BAACT had met its burden of proof in establishing its right to contribution. The Minnesota Supreme Court held:

> "BAACT established it holds a chose in action which is prima facie valid; that the chose in action was duly assigned to it; and that the chain of title dates back to the judicial sale of the bankruptcy court. Executive Aero is estopped from collaterally attacking the integrity of that judicial order and decree. A decree of a bankruptcy court which confirms a sale by the trustee is not subject to collateral attack. See, 9 Am. Jur. 2d Bankruptcy, §1217; 8A C.J.S. Bankruptcy, §325. A confirmed sale in bankruptcy confers full legal and equitable title upon the purchaser. 4A Collier, Bankruptcy §70.98[18].
>
> "The trial court is affirmed in all respects."
>
> 251 N.W.2d 107, 109 (Minn. 1977).

ARGUMENT

PETITIONER MAY NOT COLLATERALLY ATTACK THE VALIDITY OF A CONFIRMED JUDICIAL SALE IN BANKRUPTCY.

Respondent established its ownership of a chose in action for contribution. This claim for contribution resulted from the payment of $72,000.00 in excess of Mooney's fair share of the liability for the 1965 aircraft crash. The evidence presented to the Minnesota courts included bankruptcy schedules, the final order of the bankruptcy court, a copy of the purchase offer which was specifically incorporated into the Court's Order confirming the sale of the Mooney assets, and the receiver's bill of sale transferring choses in action to AEL, the predecessor in interest of the respondent, BAACT.

Petitioner has not challenged the sufficiency of this evidence to establish BAACT's claim for contribution. Rather, petitioner asserts that because of what Executive Aero claims to be irregularities in the bankruptcy proceeding, the receiver could not sell this claim. This position is not only incorrect, but is an impermissible collateral attack upon the judicial order and decree of the bankruptcy court. Professor Moore in 4A Collier, Bankruptcy, paragraph 70.98[18], p. 1195 et seq. "Effects of the Sale" states:

> "A confirmed sale in bankruptcy, together with the conveyance which the trustee is obliged to execute under Rule 606(b)(4) superseding §70g, generally confers full legal and equitable title upon the purchaser. The purchaser who complied with the terms of the contract will not be affected by, and will be protected against, any attempt to oust him or resell the same property to another. The validity of the sale

is not open to inquiry or impeachment in any collateral proceeding in either a state or federal court. * * *

"The rights and *quantum* of property acquired by the purchaser depend primarily on the terms of the sale as ordered or agreed upon."

A bankruptcy court is an equity court with broad powers to sell all the property of a bankrupt's estate. General Order in Bankruptcy 18 (now Bankruptcy Rule 606) specifically provided that:

"Upon application to the Court, and for good cause shown, the receiver or trustee may be authorized *to sell the property of the estate* or any specified portion thereof at private sale".

Here there was application to the court. There was good cause shown. The 7,000 creditors and shareholders of the bankrupt had been notified of the purchase offer of AEL which would enable the sale of the assets of the bankrupt as a going business and provide for the payment of nearly $5,000,000.00 in valid liens. Contested hearings were held on two separate days. The purchase offer went into great detail to specify that AEL was to purchase all of the assets; there is not a hint of a wish on the part of the receiver or the referee to sell anything less (except the specific claim against the former officer). The bill of sale specifically transferred the bankrupt's "business and assets" which had been defined to include:

"1.(b) * * * choses in action and claims (whether or not contingent, liquidated or unliquidated, . . .), * * * owned by, or due to, the Companies or the

Receiver or the Trustee, whether or not described in any provision of this Purchase Offer and whether or not included in the bankruptcy schedules filed by the Companies and whether existing on the date of this Purchase Offer or created hereafter."

As intended by the parties to the judicial sale, and as found by both the District and Supreme Courts of the State of Minnesota, title to the chose in action was transferred to AEL by the judicial sale of the bankruptcy court.

PETITIONER'S CASES DISTINGUISHED

Petitioner's cases do not support the proposition that a collateral attack may be made upon the order of a bankruptcy court confirming the sale of the bankrupt's assets. The cases cited by the petitioner: *In re Insulation and Acoustical Specialties,* 311 F. Supp. 1209 (W.D. Mo., W.D. 1969); *In re Layton,* 221 F. Supp. 667 (D. Ariz. 1963); and *In re Butler Candy Co., Inc.,* 8 F. 2d 311 (W.D. Penn. 1925), are cases of direct review from the order of the referee to the Federal District Court.

Petitioner has cited no cases for its proposition that a receiver in bankruptcy, cannot, in a private sale of all the bankrupt's assets, convey title without being subject to collateral attack for the obvious reason that there are no such decisions. For its proposition, however, Executive Aero does cite from an orphan decision of an inferior court, *Appling v. Minarets & Western Ry. Co.,* 100 Cal. App. 621, 280 Pac. 1029 (District Court of Appeal, First District, Division 2, Calif. 1929). A review of the opinion in *Appling* reveals that neither the order directing the private sale, nor the order confirming the trustee's sale made any specific reference to choses in action. As noted, in the Moo-

ney bankruptcy, choses of action were specifically mentioned and transferred to AEL. Unlike the BAACT action in which respondent established its title, *Appling* is further distinguished by the fact that the plaintiff had presented insufficient evidence to establish his claim. Indeed the *Appling* opinion concluded:

> "We are of the opinion that the plaintiff, having failed to prove his ownership of the cause of action, the court was right in granting the motion for a nonsuit." 100 Cal. App. at 629, 280 Pac. at 1033.

By the time of the Mooney bankruptcy, General Order in Bankruptcy 18 had been amended to provide for the private sale of the "property of the estate," whereas it formerly provided only for private sale of any "specific portion" thereof. Accordingly the *Appling* case is of no validity under General Order 18 as it existed at the time of the judicial sale of the Mooney assets. Probably the *Appling* case was never of any validity as it was in conflict with the case of *In re Nevada-Utah Mines & Smelters Corporation*, 202 Fed. 126, 128 (CCA, 2d Cir. 1913) which held:

> [2] Bankruptcy Act, §2 (7) invests the District Court with jurisdiction to "cause the estate of bankrupts to be collected, reduced to money and distributed, * * *" and (15) "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." Section 70 (b) provides that sales shall when practicable be subject to the approval of the court. Section 30 gives the Supreme Court power to prescribe all necessary orders as to procedure and for carrying the act into force and effect. Of course, it was not intended that

> the Supreme Court by such orders should control or alter the law. General Order 18 (89 Fed. viii, 32 C.C.A. xx) provides that "upon application to the court, and for good cause shown, the trustee may be authorized to sell any specific portion of a bankrupt's estate at private sale." The two bids which were accepted by the trustee did cover specific portions of the estate and together covered all the assets. Therefore there was a technical compliance with the literal language of the act. *However, we do not think that the Supreme Court could have intended or was authorized by section 30 of the act to cut down the statutory power of the District Court to collect the estate by selling the whole of it at private sale if it thought it best to do so.*[4] (Emphasis supplied.)

BAACT's evidence established that the Mooney receiver collected the whole of the bankrupt's estate and sold it all to AEL at private sale. That judicial sale is not subject to collateral attack by Executive Aero.

As BAACT established its ownership of the chose in action, and established that it paid more than its fair share

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[4]It is of interest to note that the decision in *In re Nevada-Utah Mines & Smelters Corp.* is consistent with modern practice under both Bankruptcy Rule 606(b)(1) and Rule 606(b)(2), which is described by the Advisory Committee's Note as "an adaptation of General Order 18." Rule 606 provides:

> *(b) Conduct of Sale.*
>
> *(1) Court Approval.* The property of the estate shall be sold subject to the approval of the court unless the court orders otherwise.
>
> *(2) Public or Private Sale.* All sales shall be by public auction, unless otherwise ordered by the court on application to the court and for good cause shown. Unless it is impracticable, there shall be filed with the court on completion of a sale an itemized statement of the property sold, the name of each purchaser, and the price received for each item or lot or for the property as a whole if sold in bulk. If the property is sold by an auctioneer, he shall file the statement and furnish a copy to the trustee or receiver; otherwise the trustee or receiver shall file the statement.

of the aircraft crash judgment, the Minnesota courts' award of contribution was correct.

CONCLUSION

Certiorari to the Supreme Court of the State of Minnesota should be denied.

Respectfully submitted,

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